STATE OF MICHIGAN

COURT OF APPEALS

WHISPERING PINES GOLF CLUB, LLC, Petitioner-Appellant,	UNPUBLISHED August 21, 2007
v	No. 269118 Tax Tribunal
TOWNSHIP OF HAMBURG, Respondent-Appellee.	LC No. 00-259437

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

Petitioner Whispering Pines Golf Club, LLC, appeals as of right from the judgment of the Michigan Tax Tribunal establishing the true cash value, assessed value, and taxable value of the real property in issue for the 1998 and 1999 tax years. This tax appeal is before this Court for a third time.[1] We affirm.

I. Basic Facts And Procedural History

The property in issue is an eighteen-hole golf course owned by Whispering Pines and located in Hamburg Township. The Tax Tribunal applied the income approach for purposes of establishing the true cash value, assessed value, and taxable value of real property in issue. To that end, the annual income of the property for purposes of the tax years in issue is based, in part, on the approximate number of eighteen-hole golf rounds played per year.

At the onset of this litigation, the Tax Tribunal accepted Hamburg Township's appraiser's conclusion that 31,500 rounds could be played annually, with 60 percent of those rounds played on the weekend and 40 percent played on the weekday, which was the appraiser's rough estimate based on similar golf courses in the area. Therefore, Whispering Pines could have been expected to play 18,900 weekend rounds and 12,600 weekday rounds.

[1] See *Whispering Pines Golf Club LLC v Hamburg Twp*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2003 (Docket No. 233218) (*Whispering Pines I*), and *Whispering Pines Golf Club LLC v Hamburg Twp*, unpublished opinion per curiam of the Court of Appeals, issued September 22, 2005 (Docket No. 254672) (*Whispering Pines II*).

In *Whispering Pines I*, a panel of this Court found it to be mathematically impossible to play 18,900 weekend rounds and directed the tribunal, on remand, to recalculate the number of weekend rounds, further noting that the estimates also failed to account for inclement weather.[2] On remand, the tribunal calculated 11,520 weekend rounds based on a foursome teeing off every ten minutes for an average of eight hours each day, equaling 384 players per weekend. This calculation was based on 30 weekends per year, the expected golf season. However, the tribunal again accepted the original estimate of 31,500 rounds per year, which, in turn, caused it to raise the number of weekday rounds to 19,980.

In *Whispering Pines II*, a panel of this Court concluded that the tribunal erred by failing to apply the ratio provided by the Hamburg Township's appraiser and by recalculating the number of weekday rounds because the remand order in *Whispering Pines I* did not allow the tribunal to recalculate those rounds.[3] The panel noted, however, that the ratio could be altered based on Hamburg Township's appraiser's admission that her ratio might be off.[4] On second remand, the tribunal found the total number of rounds to be 28,440, with 15,840 weekend rounds and 12,600 weekday rounds, which equated to ratio of 56/44 percent.

II. Law Of The Case

Whispering Pines contends that the tribunal erred by failing to comply with the law of the case doctrine, claiming that this Court in *Whispering Pines II* affirmed the number of weekend rounds at 11,520. To that end, it contends that the tribunal should have merely adjusted the final estimate of value according to that number. In *Grace v Grace*, this Court observed the following:

> The law of the case doctrine provides that if an appellate court has decided a legal issue and remanded the case for further proceedings, the legal issue determined by the appellate court will not be differently decided on a subsequent appeal in the same case where the facts remain materially the same. Therefore, generally, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. The rationale behind the doctrine includes the need for finality of judgments and the lack of jurisdiction of an appellate court to modify its judgments except on rehearing. Further, the law of the case doctrine applies without regard to the correctness of the prior determination, so that a conclusion that a prior appellate decision was erroneous is not sufficient in itself to justify ignoring the law of the case doctrine.[5]

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[2] *Whispering Pines I*, *supra* at 9-10.

[3] *Whispering Pines II*, *supra* at 3-4.

[4] *Id.* at 4 n 2.

[5] *Grace v Grace*, 253 Mich App 357, 362-363; 655 NW2d 595 (2002) (internal citations omitted).

We conclude that Whispering Pines' argument is wholly without merit because this Court in *Whispering Pines II* expressly stated that the discussion in *Whispering Pines I* concerning 11,520 weekend golf rounds was "not a finding" and that the number of weekend golf rounds was for the tribunal to determine.[6]

Whispering Pines also argues that *Whispering Pines II* cannot be understood as allowing the tribunal to recalculate the number of weekend golf rounds because there is no express instruction permitting it to do so. Again, we conclude that Whispering Pines' argument is wholly without merit because this Court in *Whispering Pines II* made it abundantly clear that the tribunal was to fix the number of weekday rounds at 12,600 and was to recalculate the number of weekend rounds while considering the 40/60 ratio testified to by the appraiser.[7]

III. Competent, Material, and Substantial Evidence

Whispering Pines argues that the tribunal's factual findings concerning the number of weekend golf rounds were not supported by competent evidence. We disagree. When fraud is not claimed, the Tax Tribunal's decision is reviewed for misapplication of the law or adoption of a wrong principle.[8] The tribunal's factual findings are conclusive if they are supported by competent, material, and substantial evidence on the whole record.[9] "Substantial evidence is 'the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion,' and it may be 'substantially less than a preponderance.'"[10]

The tribunal found that 15,840 weekend golf rounds could be played based on its finding that "(1) the golf season in Michigan consists of 30 weekends; (2) of the 30 weekends, 12 weekends would permit ten hours of golfing starts and 18 weekends would permit eight hours of golfing starts; and (3) 30 golfers tee off every hour on a weekend day." Whispering Pines challenges the second and third finding as unsupported by the evidence.

In calculating the number of hours played, the tribunal relied on Hamburg Township's appraiser's testimony that she believed foursomes went off every seven or eight minutes. And while Whispering Pines' counsel directed her to consider whether six or seven foursomes could be sent off per hour, this Court in *Whispering Pines I* acknowledged that she did not accept those assumptions as true.[11] Ultimately, the tribunal elected to adopt the rate of one foursome every eight minutes, which calculates to 7.5 foursomes, i.e., 30 players per hour. Accordingly, the

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[6] *Whispering Pines II, supra* at 4.

[7] *Id.* at 3-4.

[8] *Wexford Medical Group v City of Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006).

[9] *Id.* at 201.

[10] *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 221-222; 668 NW2d 181 (2003) (citation omitted).

[11] *Whispering Pines I, supra* at 10 n 31.

tribunal's second finding is conclusive because it was based on competent, material, and substantial evidence in the form of the appraiser's testimony.

In calculating the number of potential hours of golfing, the tribunal acknowledged the testimony of Hamburg Township's appraiser that it would take eight hours to send off 200 players in a day at a rate of 24 players per hour. However, the tribunal reconsidered the number of hours based on its understanding that there were many more hours in the day in which a person could golf in Michigan, which it felt was buttressed by testimony from a certified public accountant (CPA) about how "top notch" Michigan golf courses generally begin charging twilight fees at 6:30 p.m. The CPA also noted that Whispering Pines began charge twilight fees at 3:00 p.m. That Whispering Pines might begin charging twilight fees earlier in the day than "top notch" Michigan golf courses does not mean that the length of the golfing day is 3 hours shorter at the course in issue. Rather, testimony that twilight rates begin at some courses at 6:30 p.m. supports the tribunal's conclusion that, assuming a teeoff time between 7:00 a.m. and 7:30 a.m., the number of hours golfers could teeoff in Michigan "could be as high as eleven or twelve."

Additionally, the tribunal's adoption of average golfing hours below the potential number assuming no inclement weather adequately provides for the possibility that such weather could impact the number of rounds played.

Further, under § 77 of the Administrative Procedures Act,[12] "[a]n agency in a contested case may take official notice of judicially cognizable facts, and may take notice of general, technical or scientific facts within the agency's specialized knowledge."[13] A "cognizable fact" is a fact that is "capable of being perceived and known."[14] MRE 201(b) provides that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Moreover, in addition to reviewing "the propriety of the judicial notice taken by" a lower tribunal, an appellate court "can even take judicial notice on their own initiative of facts not noticed below."[15]

The tribunal concluded that golf can be played in Michigan from April to October. It also adopted a 7:00 a.m. to 7:30 a.m. morning start time. It is "generally known" that the number of daylight hours increases from April to the summer solstice in June and decreases from the summer solstice to the winter solstice in December. In 2006, the year of decision, there were twelve full weekends from April 1 until the summer solstice, which was midweek. From the

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[12] MCL 24.271 *et seq*.

[13] MCL 24.277. See *Great Lakes Div of Nat'l Steel Corp v City of Ecorse*, 227 Mich App 379, 400-401; 576 NW2d 667 (1998).

[14] *Random House Webster's College Dictionary* (1997), p 255 (defining "cognizable").

[15] *People v Burt*, 89 Mich App 293, 297; 279 NW2d 299 (1979) (observing that such authority is, "at the very least," implied by MRE 201[c]).

summer solstice until the end of October 2006, there were nineteen full weekends. Further, the actual length of the period between sunrise and sunset can be "read[ily] determined by resort to sources whose accuracy cannot be questioned." On April 1, 2006 in Ann Arbor: morning twilight began at 5:49 a.m. and evening twilight ended at 7:29 p.m.; sunrise was at 6:18 a.m. and sunset was at 7:01 p.m.[16] On June 21, 2006, the times were as follows: morning twilight began at 5:24 a.m. and evening twilight ended at 9:50 p.m.; sunrise was at 5:58 a.m. and sunset was at 9:15 p.m.[17] On October 31, 2006, the times were as follows: morning twilight began at 6:38 a.m. and evening twilight ended at 5:59 p.m.; sunrise was at 7:07 a.m. and sunset was at 5:30 p.m.[18] Thus, for the entire postulated golf season in 2006, the sun had risen during the assumed morning start time, and the number of daylight hours was never below ten. On April 1 and June 21, the approximate number of hours between 7:00 a.m. and sunset were twelve and fourteen, respectively.

Clearly, an eighteen-hole round of golf could not be started and completed at *any* time during the daylight hours. For example, while a round of golf that was started at 9:14 p.m. on June 21, 2006 could have been played through the evening twilight illumination, the round could not have been continued once complete darkness fell thirty-five minutes later. However, a round could arguably have been played between 5:00 p.m. (ten hours after the 7:00 a.m. start time) and 9:50 p.m. Indeed, it is likely that a foursome could have begun later than 5:00 p.m. on June 21, 2006 and still have completed an eighteen-hole round of golf. Two golfers beginning even later than this hypothetical foursome could arguably have completed nine holes each before darkness fell, which as the tribunal noted is comparable to one eighteen-hole round of golf. It might be difficult for a foursome beginning at 5:00 p.m. on April 1, 2006 to complete the round before the sun set or by the end of evening twilight (approximately 2 and 2.5 hours, respectively). However, the expansion of the golfing day as the season approaches the summer solstice would balance out the shorter days early on in the season. This entire line of reasoning applies equally to the post-summer solstice portion of the season.

Accordingly, the tribunal's third finding is conclusive because it was based on competent, material, and substantial evidence.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra

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[16] US Naval Observatory, Astronomical Applications Department, <http://www.usno.navy.mil/> (accessed August 20, 2007). No information was available on the cited website for Hamburg. However, Ann Arbor is only approximately fifteen miles from Hamburg.

[17] *Id*.

[18] *Id*.